COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

ADVANCING GLOBAL COMMUNICATIONS THROUGH COMPETITION

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CompTel

EX PARTE OR LATE FILED

December 13, 1999

Via Hand Delivery

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Presentation in CC Docket No. 99-295

Dear Ms. Salas:

Pursuant to Section 1.1206 of the Commission's rules, the Competitive Telecommunications Association ("CompTel") hereby gives notice that on December 10, 1999, its representatives met with Commissioner Susan Ness and Jordan Goldstein, her Legal Advisor, to discuss difficulties its members had encountered in trying to obtain from Bell Atlantic-NY elements required under the "Competitive Checklist" of Section 271(c)(2)(B) of the Telecommunications Act of 1996. CompTel also discussed the need for the Commission to adopt comprehensive anti-backsliding conditions, if the Commission were to approve Bell Atlantic's pending application in the above-captioned docket. Representing CompTel were Russell Frisby, President, and the undersigned attorney. Also in attendance at the meeting were Randall Lowe and Renee Crittendon of Prism Communications Services, Inc.; and, Julia Strow of Intermedia Communications, and Jonathan Canis of Kelley, Drye, and Warren, Intermedia's outside counsel.

In the meeting, CompTel also provided the Commissioner and Mr. Goldstein with written materials, summarizing CompTel's position, copies of which are attached. In accordance with Section 1.1206(b), an original and one copy of this notice, and the attached materials, are being provided.

Sincerely,

Jonathan D. Lee
Vice President,
Regulatory Affairs

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by New York Telephone	)	
Company (d/b/a Bell Atlantic – New York),	)	
Et al. Pursuant to Section 271 of the	)	CC Docket No. 99-295
Communications Act of 1934, as amended,	)	
To Provide In-Region, InterLATA Services	)	
In New York	)	
	)	

COMMENTS OF THE

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DATED: October 19, 1999

SUMMARY

One of the principal purposes of Section 271 is to provide a mechanism to ensure that the market-opening initiatives of the 1996 Act are fulfilled. "Track A," the competitive checklist, and the public interest test share as their underlying focus a desire to see proof that opportunities to provide local service are genuine, widespread and sufficient. As the primary industry association representing all types of competitive providers, it is CompTel's fundamental policy mandate to see that the Act's competitive opportunities are maximized for *all* its members, both today and in the future.

In New York, we are beginning to see the fruits that the 271 tree can bear. Twenty three of CompTel's members are providing or preparing to provide local service within New York, at varying stages of entry. With some of Bell Atlantic's commitments in New York, the results of third party testing performed by KPMG, and the New York Commission's pro-competitive orders, we finally are beginning to see the cracks in Bell Atlantic's obstacles to entry in the local market. This progress is proof that – if backed by the firm resolve of the FCC and by the leadership of state commissions like the New York Public Service Commission – the interLATA incentive can achieve its desired results. But recognition of just how far BOC compliance has progressed compared to previous applications does not lessen in any way the rigorous standards of Section 271.

Despite progress that clearly exceeds that exhibited by previous Section 271 applications, there are still unacceptable barriers to competitive local exchange entry in New York. Very real problems remain – problems that result from Bell Atlantic policies that restrict competition; from inadequate or unreliable ordering and provisioning capabilities; and from incomplete remedies for non-performance. These problems deny New York consumers the

benefits of full and fair competition for local exchange service. Unless and until these problems are addressed, Bell Atlantic's attempt does not achieve the goals established by Section 271. Although CompTel is encouraged by the progress to date, a faithful application of Section 271 requires the Commission to deny the Bell Atlantic application.

BELL ATLANTIC HAS NOT SATISFIED THE CHECKLIST

Bell Atlantic's showing of checklist compliance continues to suffer from three main defects:

Unlawful Restrictions: Even after the Supreme Court, last January, reinstated Bell Atlantic's obligation to offer end-to-end combinations of unbundled network elements (the so-called UNE "platform") and other partial combinations such as the Enhanced Extended Link ("EEL"), Bell Atlantic continues to place unlawful restrictions on access to these elements critical to widespread market entry. CompTel demonstrates that the "primarily local" restriction on use of extended links, "glue charges," and the denial of the platform for all business customers in many end offices contradict the Act and the Commission's rules. Accordingly, until Bell Atlantic offers unrestricted access to these elements, it is not in compliance with the checklist.

Failure to Address the UNE Remand: Related to Bell Atlantic's refusal to modify its proposals after the Supreme Court's decision, Bell Atlantic makes only a passing reference to the FCC's reaffirmation of the unbundling requirement in the UNE Remand proceeding. Because the UNE Remand order interprets the same statutory requirements on which the FCC must make affirmative findings in this proceeding, the Commission cannot let Bell Atlantic ignore whether, how, or when it would comply with this order. Therefore, if the FCC does not deny the application for its complete failure to address this foreseeable issue, it must require Bell

Atlantic to submit in the record of this proceeding a compliance plan, and must afford all interested parties an opportunity to comment.

While CompTel's concerns about Bell Atlantic's existing restrictions on UNEs and future compliance with the Commission's UNE Remand may seem like mere legal technicalities, the practical effect of failing to consider these problems may be that New York consumers, by virtue of Bell Atlantic's self-serving claims of ignorance of the law, will not get the benefit of a rigorous 251(c)(3) compliance analysis that the Commission will almost certainly apply to every subsequent Bell Atlantic 271 application.

Continued Deficient Provisioning of UNEs: Bell Atlantic continues to be unable to provision network elements reliably or in a commercially acceptable manner. For the most customer-affecting type of UNE orders -- a "hot cut" of a functioning loop from the ILEC to a CLEC -- Bell Atlantic continues to put an unacceptable number of customers out of service for extended periods and fails to follow the coordination procedures it has agreed to follow in order to minimize such errors. In addition, Bell Atlantic fails to provide transport in a reasonable, timely and non-discriminatory manner. Finally, Bell Atlantic is imposing unlawful and discriminatory restrictions on loops used for xDSL services, thereby impeding the deployment of this widely popular technology.

BLUEPRINT FOR ANTI-BACKSLIDING ENFORCEMENT

Bell Atlantic's present failure to provision UNEs in a non-discriminatory manner and to otherwise comply with the checklist is exacerbated by the fact that a comprehensive performance assurance mechanism does not exist. To date, Bell Atlantic's performance assurances have been limited to the development of "self-enforcing" remedies under the auspices

of the New York Commission. However, these assurances fail to ensure adequate legal and equitable remedies for the entire spectrum of potential post-271 performance deficiencies.

The Commission cannot conclude that the application will serve the public interest unless it adopts a comprehensive anti-backsliding blueprint. These conditions must work with all three methods of enforcement under the Act: (1) private, self-enforcing remedies, (2) carrier instituted complaints and arbitrations, and (3) agency-initiated enforcement, such as forfeitures, suspensions and revocation of authority.

The Commission has a strong legal basis to condition Bell Atlantic entry on compliance with such a blueprint. As CompTel explains, such conditions are contemplated by Section 271, have traditionally been imposed under the Commission's authority pursuant to Section 310(d) over radio licenses, and find additional support pursuant to Sections 201(b), 214, 303(c) and 154(i) of the Communications Act. Moreover, the scope of the Commission's authority is as broad as its traditional public interest analysis, and CompTel's proposal does not implicate Section 271(d)(4)'s prohibition on limiting or extending the terms of the checklist. Because the conditions will take the economic incentive out of substandard performance and will assist the processes of addressing persistent or egregious problems, they will further the public interest in this case. Only with these conditions can the Commission receive adequate assurance that local markets will be open to all methods of entry and will remain so after Section 271 is satisfied.

Specifically, CompTel proposes the following additional remedies be made available as a blueprint for effective enforcement.

Self-Executing Remedies

- Apply matching *federal* guarantees of performance in addition to those remedies available under the P.A.P.

- Apply *additional remedies* if Bell Atlantic's performance in a Critical Measure is significantly worse than the benchmark, such as refunds equal to all charges the CLEC billed to the affected end users.

- Apply additional remedies for deficient performance that is *industry-wide*.

Carrier-Initiated Remedies

- Deem repeated failures to meet Critical Measure performance metrics in the P.A.P. – *e.g.,* failure to meet any performance metric twice in a three consecutive reporting periods, or three times in any six consecutive reporting periods – to be prima facie evidence in complaint proceedings of a violation of BA-NY's interconnection agreements.

- Deem Critical Measure performance that is significantly worse than the benchmarks to be prima facie evidence of a failure to provide interconnection or access under Section 251.

- Address non-quantitative failures by presumptions of non-compliance. For example, prima facie evidence of discrimination could be provided by evidence that Bell Atlantic does not devote equivalent resources to wholesale and retail businesses or that it applies discriminatory performance bonuses and incentives for executives in the wholesale and retail businesses.

- Deem certain failures to comply with basic obligations under Section 251 to be prima facie evidence of liability to CLECs. For example, failure to respond to an interconnection request within 14 days or failure to provide opt-in under Section 252(i) within 14 days shall be deemed to be bad faith by Bell Atlantic. Similarly, failure to provide collocation within the time frames specified in the *Collocation Order* will be deemed a breach of its obligation under Section 251(c)(2) to provide interconnection.

- "Ordinary" poor service, as described above, when coupled with "intent" evidence that Bell Atlantic is seeking to profit its retail arm by exploiting competitor's poor service, for which it may be at least partially responsible. E.g., Bell Atlantic provides poor repair and maintenance intervals to a CLEC, and sends CLEC retail customers a "winback" letter asking them whose service they would trust during the next big storm.

Agency-Initiated Remedies

- Repeated failures to meet any Mode of Entry performance metric *on an industry-wide basis* should trigger a performance improvement evaluation under the supervision of the FCC's Common Carrier Bureau. For example, upon a repeated failure to meet a metric, Bell Atlantic should be required to submit a performance improvement plan to the Common

Carrier Bureau, and the Bureau should submit public comment on the improvement plan.

- Significant non-compliance with performance metrics should trigger forfeiture proceedings with substantial ($1 million or more) penalties. Each day under the reporting period should be deemed a separate event subject to the forfeiture authority of the agency.

- Whenever wholesale provisioning problems are either so egregious or pervasive as to be, in the Commission's opinion – industry affecting, such that the public policy goals of Congress may be jeopardized, the FCC should take whatever action it needs to implement the goals of Congress, including, possibly, consideration of a structural separation between Bell Atlantic's wholesale and retail businesses.

CompTel's NY 271 Position

Briefing with

Commissioner Susan Ness

December 10, 1999

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CompTel's NY 271 Position

- FCC Has an Adequate Basis to Deny The BA-NY 271 Application
  - CompTel members, DoJ, and the NYAG have demonstrated that BA-NY is not adequately providing access to:
    - Loops: voice grade, DSL-capable, and hi-cap
    - Transport: dedicated, trunk and line side
    - UNE combinations

CompTel's NY 271 Position

- If the FCC decides to approve BA-NY's Application, CompTel proposes:
  - the Commission must condition approval on the adoption of a *comprehensive* federal performance assurance plan
  - the Commission has the authority to grant conditional approval of a 271 Application

CompTel's NY 271 Position

- Why is a Commission-created plan necessary?
  - NY PAP does not have adequate remedies to either compensate for past poor performance, or deter future poor performance
  - NY PSC does not have the authority or flexibility under its state charter that the FCC has to remedy performance failures under the Act

CompTel's NY 271 Position

- CompTel's Recommended Approach
  - Self-Executing Remedies
  - Carrier Initiated Remedies
  - Agency Initiated Remedies
- Recognizes that *legal* obligations should never be economically avoided--result of breach is harm to public: which loses benefits of competition

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CompTel's NY 271 Position

- Self-Executing Remedies
  - Intended to be:
    - "Automatic"
    - Compensatory
  - Hearing upon request; should be "loser pays"
  - Damages increase in proportion to:
    - Severity of breach: miss by a lot, or repeatedly
    - Scope of breach: industry-wide poor performance

CompTel's NY 271 Position

- Carrier-Initiated Remedies
  - Intended to provide "consequential" damages for carrier-specific breaches that are:
    - Especially severe: significantly below benchmarks, or frequent, repeated failures
    - Intentional; "bad faith"
  - Hearings should be expedient--"rocket docket"
  - FCC should establish objective indicia of what it considers to be *prima facie* "bad faith"

CompTel's NY 271 Position

- Agency-Initiated Remedies
  - Intended to be both punitive and remedial
  - Triggered by severe or intentional performance failures, but scope is industry-wide
  - Commission should establish objective triggers which will initiate an inquiry
  - Equitable (*e.g.*,revocation of 271) and monetary (*e.g.*,forfeitures/fines) relief

CompTel's NY 271 Position

- Features of CompTel's Approach
  - Adopts performance measures and standards in NY PAP
  - Contains presumptions and *prima facie* standards for establishing a violation
  - Correlates damages with severity of performance failure for each type of remedy

CompTel's NY 271 Position

- Features (cont'd.)
  - FCC administration ensures swift and certain resolution of alleged violations
  - Comports with DoJ recommendation that performance plans contain:
    - Clarity, regarding expected performance
    - Certainty, that poor performance will be punished
    - Adequate Penalties, to deter future performance

CompTel's NY 271 Position

- FCC has authority to impose conditions to ensure that local market will remain open to competition:
  - "Public Interest" standard has its traditional meaning developed through agency and court decisions
    - FCC routinely uses public interest standard to impose competition-protecting conditions in station license transfers under §310(d)

CompTel's NY 271 Position

- "Conditions" are not inconsistent with a grant of approval under §271
  - implied under §271(d)(6), which allows FCC to revoke authority if RBOC ceases to meet any conditions required for approval
  - explicit under §214(c),which was not revoked by §271.
- General authority: §§ 303(r), 154(i), 201(b)